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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1963

No. [redacted] 108

NATIONAL SURETY CORPORATION

PETITIONER,

v.

UNITED STATES OF AMERICA for the use and benefit of OLMOS BUILDING MATERIALS COMPANY,

RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, National Surety Corporation prays that a writ of certiorari issue to review this decision of the United States Court of Appeals for the Fifth Circuit because the majority of the court, Tuttle Chief Judge, dissenting, has decided an important state question in a way in conflict with applicable state law.

### OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are reported in 327 F.2d 254, and copies are appended hereto (Appendix A, infra). The judgment of the District Court (without opinion) is not reported, but is found in the printed Record, pp. 21-24.

## JURISDICTION

The judgment of the Court of Appeals was entered January 13, 1964. Petition for Rehearing was timely filed, and the order denying the Petition for Rehearing was entered February 21, 1964. This Court has jurisdiction under 28 U.S.C.A. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the petitioner as surety on the payment bond, liable for attorney's fees, where the bond limits the surety's liability to payment for labor and materials supplied in the prosecution of the work?

2. Did the Court of Appeals err in failing to correctly apply the law of Texas, which authorizes the recovery of attorney's fees against the surety only when the payment bond itself embodies such liability by express or implied terms?

3. Did the Court of Appeals err in holding the surety liable for attorney's fees covering services rendered subsequent to the date the funds were tendered by the petitioner into the Registry of the Court, and including the appeal?

## STATUTES INVOLVED

The Federal "Miller Act" (In Relevant Part):

40 U.S.C.A., Section 270a. **Bonds of contractors for public buildings or works . . .**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded

to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract . . .

Section 270b. **Same; rights of persons furnishing labor or material.**

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit. . ..

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit. . .

Vernon's Texas Civil Statutes, Art. 2226. **Attorney's Fees.** Any person having a valid claim against a person or corporation for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured,

or suits founded upon a sworn account or accounts, may present the same to such person or corporation or to any duly authorized agent thereof; and if, at the expiration of thirty (30) days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney.

## STATEMENT OF THE CASE

This is a Miller Act case, arising out of a contract, executed and performed in Texas, (R. 3, 11) for the improvements and rehabilitation of a Federal Housing Project located at Kelly Air Force Base, Texas. Respondent, Olmos Building Materials Co., delivered materials for use in connection with this project (R. 11) The Miller Act Bond, executed by petitioner, was a standard payment bond Form 25A, conditioned that:

". . . if the principal shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract, then said obligation would be void; otherwise to remain in full force and virtue" (R. 12).

The cause of the controversy is the allowance of attorney's fees to the supplier of materials on this federal project against the prime contractor's surety. There is no dispute as to the supplier's right to recover attorney's fees against the prime contractor, Madden Company, Inc., by virtue of Texas Statute Art. 2226.

The correctness of the respondent supplier's claim for materials was not questioned in the trial court by either

the prime contractor or the surety, and the full amount of which was tendered into the registry of the court was paid over to the respondent prior to the trial. Since the respondent had been paid in full for the material it furnished, the trial itself was not a suit within the right conferred by the Miller Act, 40 U.S.C.A., sec. 270a.

The only issue involved in the trial was the recovery of attorney's fees. The trial court awarded a recovery of attorney's fees against the surety for services rendered during the trial of the issue of the recovery of attorney's fees, and also held that additional attorney's fees incurred on appeal were recoverable.

## REASONS FOR GRANTING WRIT

### Summary

Certiorari should be granted because the majority of the Court of Appeals for the Fifth Circuit has decided an important state question in a way in conflict with state law. The improper application of state law will have a profound effect both in the Federal and State judiciary in cases of this nature. A Miller Act Standard Bond, Form 25a, is involved in this case. If the surety in this case has not been accorded the proper application of Texas Law, then likewise the sureties on a multitude of similar bonds, universally used in the construction industry, will be prejudicially affected by being required to pay attorney's fees on every claim for every item of material and labor incorporated into every federal project. This in turn could result in increases in federal contract bond premiums and a tightening of requirements for bidders on federal works. This in turn will undoubtedly tend to eliminate small contractors from federal projects, contrary to the government's policy of aiding small businessmen.

**1. The majority of the Fifth Circuit erred in interpreting and applying the Substantive Law of Texas in holding Petitioner, National Surety Corporation, liable for attorney's fees under its standard Miller Act Surety Bond, Form 25a, and in so doing is in conflict with applicable state law.**

The Miller Act does not provide for attorney's fees. Therefore, the question of the recoverability of attorney's fees under a Miller Act bond is determined by state law. **United States for the use and benefit of Caldwell Foundry and Machine Company vs. Texas Construction Co. (5th Cir. 1955) 237 F.2d 705.** Under the law of Texas attorney's fees are not recoverable, except where allowed by statute or by the contract of the parties. **Wm. Cameron & Co. vs. American Surety Co. of N. Y. 1932, Tex. Comm. of App., 55 S.W. 2d 1032, opinion adopted by the Texas Supreme Court.** There is no statute in Texas specifically authorizing recovery against the surety under a Miller Act bond. The Texas general statute authorizing recovery of attorney's fees (V. A. T. S. Art. 2226) does not reach the surety, whose only liability is contractual and, therefore, the only source of liability must be found in the payment bond itself. **National Union Fire Ins. Co. v. Southwestern Grey. Lines, 322 S.W. 2d 61, (Tex. Civ. App. 1959) err. ref'd., n.r.e.** The language of the bond in this case, properly construed does not cover attorney's fees but limits the surety's liability for payment for **labor and materials** supplied in the prosecution of the work.

The language of the bond is controlling. The case of **F. & C. Engineering Co. vs. Moore,** 300 S.W. 2d 323 (Tex. Civ. App. 1957) writ ref'd. n.r.e., should control the result of this suit. In that case, a bond identical to the one involved in this case, was construed by the Court and the following language is found in that opinion:

> "These attorney's fees are not recoverable as against the surety. Its obligation to pay arose from the bond sued upon and is controlled by its provisions to pay for labor and material furnished." 300 S.W. 2d 323, 327.

The Court concluded that attorney's fees were not recoverable as against a surety under a Miller Act Standard Form 25a Bond.

The Supreme Court of Texas in **Mundy vs. Knutson Construction Co.**, 294 S.W. 2d 371 (Tex. Sup. Ct., 1956) established the rules of construction to be followed in cases involving liability of sureties for attorney's fees. That case emphasized the precise language of the bond before the court, and carefully discussed preceding authorities. The opinion emphasized that as a general rule, attorney's fees are not recoverable except where the language of the bond may be construed as imposing such an undertaking. The opinion carefully separated two lines of cases involving bonds indemnifying against costs and expenses. One line of cases is represented by **Wm. Cameron & Co. vs. American Surety Co. of N. Y.**, (Supra.). In that case it was held that the surety was not liable for attorney's fees even though the bond required the contractor to fully indemnify and save harmless the owner from **all costs and damages** which he might suffer by reason of failure to perform the contract and satisfy all claims and demands for the same.

The Court in the **Mundy** case did not overrule the **Cameron** case, but merely distinguished it by the language of the bond under consideration and from the line of cases authorizing recovery. The **Mundy** bond went beyond mere costs and damages. The opinion emphasized the difference by saying:

> "The language of our performance bond, as set out above, is to '. . . repay all costs and expenses . . . (Knutson) may incur in the prosecution of any suit or suits, which they (it) may maintain against said principal on account of any breaches of said contract, or of this bond', . . . Since the wording of our bond expressly provides for payment of all costs and expenses incurred in the prosecution of a suit or suits on a breach of the construction contract, or on that very bond, we feel attorney's fees so incurred was a proper measure of recovery by Knutson." 294 S.W. 2d 374."

The Texas Supreme Court thus held that attorney's fees were recoverable as a part of costs and expense incurred in the prosecution of the suit against the surety bond, but only because the **express language of the bond authorized such a recovery.** If the Mundy and Wm. Cameron cases are considered together, it is clear that the Texas Supreme Court would construe the language of the bond before this court so as to prevent a recovery of attorney's fees.

The bond in this case does not even indemnify against costs and expenses, but only for labor and material supplied in the prosecution of the work, and this language falls short of that in any other Texas case where attorney's fees have been authorized against the surety.

Both principal and surety are admittedly liable for the payment of labor and materials furnished on the job. The principal is liable for **attorney's fees,** not by reason of the contract or the bond, but because of Article 2226. But the surety has no liability for attorney's fees, because **this form of bond has been construed** and found to embrace no more than payment for labor and materials furnished.

The majority of the Court of Appeals relies upon **Ferrier Bros. v. Brown, et al,** 362 S.W. 2d. 181 (Tex. Civ. App., 1962).

err. ref'd., n.r.e., as being "the nearest in point". This is done notwithstanding that in **Ferrier** the suit is under the Texas McGregor Act (Article 5160), reliance is entirely on the **Caldwell** decision of the Fifth Circuit, and the language of the bond is nowhere alluded to and is completely unknown. In **Ferrier,** the Court first held that attorney's fees were properly awarded against the principal under Article 5160 and Article 2226. Then the Court said:

> "Any doubt as to appellee's right to also recover attorney's fees from Ferrier Brothers' surety is dispelled by the decision in U.S. for use and benefit of Caldwell Foundry & Machine Co. v. Tex. Const. Co., 5th Cir. 237 F. 2d 705.", (quoting therefrom.).

But, it should take very little study of the **Caldwell** opinion to conclude that it **did not** dispel any doubt as to the surety's liability for attorney's fees. What **Caldwell** actually held was that Texas law controlled in the matter of attorney's fees. And though the surety had not raised the question, and obviously **had not briefed the Texas law,** the opinion went on to volunteer the statement: "We think it (the judgment) should include also a reasonable amount as attorney's fees." The only authorities cited were District Court opinions from Alaska and Arkansas, each of which jurisdictions have special statutes allowing recovery of attorney's fees against the surety.

Does the law of Texas really control on this question? If so, neither **Caldwell** nor **Ferrier** applied or decided any substantive Texas law on the subject of attorney's fees. Certainly **Caldwell** can have little value as precedent, when the opinion writer has merely volunteered a conclusion on a question that was neither raised nor briefed by the parties. Particularly is this true when that conclusion is **contrary** to the clear and concise holdings of the Supreme Court of Texas.

Furthermore, the fact that Texas Art. 5160 is taken from the Miller Act is not material. Neither statute has been construed as requiring assessment of attorney's fees. It is the general law of Texas that controls.

To be blunt, **Ferrier** is but the illegitimate offspring of the judicial mistake committed in **Caldwell**. Both Courts shunned the Texas law and the provisions of the payment bond. Now the time has come to do more than merely give lip service to the established rule that state law controls, and a determination of the question requires a construction of the bond language **based upon the law of Texas.** By resting its decision on **Ferrier,** the majority has in fact adopted this offspring, and thereby rendered legitimate and authoritative the decisions which have no basis in Texas law.

To give controlling effect to **Ferrier** is to destroy all rules of precedent. It is to say that this Court has no power to correct the obvious mistake in **Caldwell,** because a Texas Court has compounded that mistake by adopting it in preference to the law of Texas. It is to say that Federal law controls on this question, not because this is right, but because a Texas Court in **Ferrier** has adopted **Caldwell** as its rule of decision. Finally, worst of all, it is to say that **Ferrier,** by its reliance upon **Caldwell,** which in turn relied upon Alaska and Arkansas local practice, has itself become controlling Texas law.

It is evident that the Texas Supreme Court in **Mundy** did not find any precedential value in **Caldwell,** nor did this Court in the case of **Continental Cas. Co. v. Conroe Creosoting Co.,** 308 F. 2d. 846 (C.A. 5, 1962). In the **Conroe** case, this Court did what it should have done in this case: that is, it gave controlling effect to the limited language of a Miller Act bond. Being cited the **F. & C.**

**Engineering** case by the surety, this Court came to grips with the language of that bond, which is now shown to be identical with the bond in this case. The Court commented:

> "In that case the bond limited the surety's liability **only for labor, material and equipment.** The bond in this case goes beyond that. Subparagrapn 2 of paragraph 4 provides that the surety shall be liable for such sum or sums as may be justly due claimant. The decision of the District Court as to the right of these appellees to recover attorney's fees was based upon this provision of the bond, and we agree with the decision of the District Judge that appellant is liable to each appellee for a reasonable attorney's fee." (Emphasis ours)

Now what provision of the bond is relied on by the majority here? Apparently the only contention is that the bond requires that "the principal shall **promptly** make payment to all persons supplying labor and materials." The majority also gives significance to appellee-respondent's demand letter, that "if this claim is paid **promptly**, no suit will be filed." This argument, most of all, demonstrates the weakness of the majority holding. It would recognize that the language of the bond is controlling, but it has seized upon language which can in no wise authorize the result in this case. Does the word "promptly" add anything of substance to the bond, or broaden the liability of the surety which otherwise would be limited to labor and materials furnished? Certainly not. If we look at this bond simply to determine what things, objects or services are covered by the bond, it cannot be said that the word "promptly" adds any additional thing, object or service to those already enumerated, to-wit: labor and materials. The fact that the bond is conditioned upon payment being made by the principal "promptly" relates only to the **time** that the contractual obligation comes into

being, and has no relation to the extent or substance of that obligation.

**2. The majority of the Fifth Circuit erred in holding that Respondent was entitled to recover attorney's fees from Petitioner for services rendered on the appeal of this case from the Trial Court.**

The Supreme Court of Texas in **Huff vs. Fidelity Union Life Insurance Co.**, 1958, 312 S.W. 2d 493, held that attorney's fees were in the nature of a penalty or punishment for failure to pay a just debt and although not ordinarily recoverable in tort or contract actions, that in those cases where such fees are recoverable under Art. 2226, V.A.C.S., a suit therefor, could not be maintained in a separate action. In National Surety Corporation v. Concrete P. Sales Co., 1963, Tex. Civ. App., 366 S.W. 2d 103, the Court held it to be reversible error for the trial court to sever the claim for attorney's fees from the suit on account, because a claimant is required to recover a judgment on his claim before attorneys' fees are recoverable. These cases demonstrate that the penalty allowed by the Texas Statute is for failure to pay the debt — not a penalty for refusal to pay the penalty. To allow attorneys' fees after tender of the debt, amounts to allowing a penalty on a penalty.

The debt having been fully paid and satisfied prior to trial (R. 7, 14), and a judgment not having been obtained on the debt, this Court should disallow the recovery of attorneys' fees; or, in any event, Respondent should not be allowed to recover for services of the attorneys, rendered exclusively on the question of the recoverability of attorneys' fees, subsequent to Petitioner's tender of the principal debt, since this would in effect allow a separate action for attorneys' fees which is forbidden under Texas law.

## CONCLUSION

The majority has failed to apply applicable state law to the questions presented in this case. This failure has resulted in an improper construction of the bond and will have a profound effect in cases of this nature. Petitioner respectfully submits that the majority materially departed from the language of the payment bond and has in effect judicially written a new bond between the parties.

For these and the foregoing reasons, Petitioner prays that this Petition for Writ of Certiorari be granted and that the judgment of the majority of the Fifth Circuit be reversed as being in conflict with the applicable state law. Petitioner further prays for all costs of suit and for such other relief to which it may show itself justly entitled.

Respectfully Submitted,
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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Dobbins and Howard, Attorneys for Respondent, Tower Life Building, San Antonio, Texas, on this the 20th day of May, 1964, pursuant to Rule 33.

Fred Clark

## APPENDIX

**NATIONAL SURETY CORPORATION, Appellant,**

**v.**

**UNITED STATES of America for the Use and Benefit of OLMOS BUILDING MATERIALS COMPANY, Appellee.**

**No. 20603.**

United States Court of Appeals
Fifth Circuit.

January 13, 1964.

Rehearing Denied February 21, 1964.

Suit by supplier of materials against prime contractor and its surety. The United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge, allowed attorneys' fees, and one of the defendants appealed. The Court of Appeals, Gewin, Circuit Judge, held that the surety of Texas prime contractor was liable for supplier's attorneys' fees, where bond required surety to promptly pay contractor's suppliers, contractor and surety both defaulted in making prompt payment, and supplier had to employ counsel and institute legal proceedings against surety and contractor.

Affirmed and remanded.

Tuttle, Chief Judge, dissented.

1. **Federal Civil Procedure — 2737**

Principal contractor is liable for attorneys' fees incurred by supplier procuring judgment for his claim. Vernon's Ann.Civ.St.Tex. art. 2226.

2. **Principal and Surety — 73**

The surety of a Texas prime contractor was liable for supplier's attorneys' fees, where bond required surety to

promptly pay contractor's suppliers, contractor and surety both defaulted in making prompt payment, and supplier had to employ counsel and institute legal proceedings against surety and contractor. Vernon's Ann.Civ.St.Tex. art. 2226.

3. **Federal Civil Procedure — 2737**

Allowing attorneys' fees for services rendered subsequent to date when liability was admitted and funds were unconditionally tendered into registry of court was not error, where only 18 days elapsed from time tender was made until date of pretrial order directing payment of sum tendered without prejudice to plaintiff's right to prosecute claim for fees incurred and final judgment was entered approximately three weeks later.

4. **Federal Civil Procedure — 2743**

Where there was reservation of question as to attorneys' fees when tender into registry of court was made, and most of services were rendered prior to date of tender, it was proper for trial court to provide for allowances as to attorneys' fees for services on the appeal, and the reasonableness of fees for such services should be determined by trial court.

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Dayton G. Wiley, Green, Green & Wiley, San Antonio, Tex., for appellant.

William P. Dobbins, Dobbins & Howard, San Antonio, Tex., for appellee.

Before TUTTLE, Chief Judge, GEWIN, Circuit Judge, and BREWSTER, District Judge.

GEWIN, Circuit Judge:

The cause of the controversy in this suit is the allowance of attorneys' fees in a suit by the supplier of materials against the prime contractor and its surety.

The contract under consideration was primarily between Madden Company, Inc., as prime contractor, and the United States of America, which provided for the improvement and rehabilitation of certain properties at Kelly Air Force Base in Bexar County, Texas. The use plaintiff, Olmos Building Materials Company, furnished materials used in the prosecution of the work. National Surety Corporation was surety on the bond of Madden Company, Inc., as principal, by the terms of which the principal and the surety bound themselves jointly and severally for the amount of the bond conditioned as follows:

> "that if the principal shall **promptly** make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract and any and all duly authorized modifications of said contract, then said obligation shall be void, otherwise to remain in full force and virtue."[1] (emphasis added.)

Without question the bond was accepted and approved; Olmos furnished materials to Madden on open account, which materials were used in the prosecution of the work to be done pursuant to the contract; Madden unqualifiedly promised and agreed to pay Olmos the sums charged for the materials; and after the allowance of all just and lawful offsets, payments and credits, the sum of $2,295.24 was past-due and unpaid when plaintiff filed suit; and Madden had failed and refused to pay any part of said sum.

The last delivery date of the building materials and products involved was made by Olmos to Madden on May 14, 1962, over 90 days prior to but less than one year before suit was filed. On September 13, 1962, Olmos filed a writ-

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1. The record does not contain the exact language of the bond. Apparently, the bond was not introduced into evidence. The above quotation is taken from the brief of the appellee, and on oral argument the parties agreed that it is correct.

ten proof of claim with National Surety in which clear notice of the default on the part of Madden was given. Olmos made demand for payment on Madden and on National Surety, which demand was ignored for more than 30 days after it was made. At the time the proof of claim, notice of default, and demand for payment were made, attorneys for Olmos made the following statement in the letter transmitting the same.

> "* * * However, if this claim is paid **promptly**, no suit will be filed and, therefore, no attorneys' fees nor costs of Court will be added to the claim. By promptly, we mean at least within thirty days from ths (sic) date." (emphasis added.)

National Surety failed and refused to make payment, whereupon Olmos employed counsel, obligated itself for attorneys' fees and filed suit on October 25, 1962.

National Surety filed an answer on November 15, 1962. On January 11, 1963, National Surety tendered into the registry of the court the above mentioned sum of $2,295.24 plus interest and court costs, making a total payment of $2,355.68. The tender was made shortly before pre-trial hearing. A pre-trial order was entered on January 29, 1963. The Clerk was directed to pay the sum tendered to Olmos without prejudice to the right of Olmos to prosecute its claim for reasonable attorneys' fees incurred, and to be incurred on appeal, and without prejudice of National Surety to contest its obligation to pay attorneys' fees. The principal, Madden Company, Inc., defaulted.[2]

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2. On January 29, 1963, the trial court entered an order pursuant to a motion of Olmos setting forth an agreement of the parties as to the tender and attorneys' fees, which order directed the Clerk to pay the tendered funds to Olmos "* * * without prejudice to the right of the Plaintiff and Use-Plaintiff to prosecute the claim of the Use-Plaintiff for reasonable attorneys' fees incurred in this matter and to be incurred on appeal and without prejudice of said Defendant to contest its obligation to pay said amount."

The trial court found that Olmos has employed competent counsel to file suit and had agreed to pay reasonable attorneys' fees for services to be rendered; that up to the time of the entry of judgment, counsel for Olmos had spent approximately 40 hours in the preparation of prosecution of the claim; that the evidence showed that such services were valued at the rate of $25.00 per hour; and that approximately half of such time was devoted to the case up until November 15, 1962, when National Surety filed its answer,[3] and half of such time was devoted subsequent to that date. The court concluded that Olmos was entitled to recover jointly and severally from Madden, as principal, and National Surety, as surety, reasonable attorneys' fees, including attorneys' fees on appeal if incurred; and the court fixed as reasonable attorneys' fees the sum of $750.00 "* * * for attorneys' services up to and including entry of judgment." Jurisdiction was reserved to fix attorneys' fees to which Olmos "* * * is entitled should this case be appealed until a reasonable time after all appellate action has terminated and the mandate of the appellate court filed herein." The record further discloses that the reasonableness of the fee awarded by the court is not questioned by National Surety.

On this appeal, National Surety contends that it is not liable for attorneys' fees because there is no Texas statute specifically authorizing the same, and that the contract between the parties does not authorize such fees. It is further contended that even if such fees are allowable, the trial court erred in allowing fees for services "* * * up to and including entry of judgment"; that no fee should be allowed for services rendered after it admitted liability and tendered principal and interest into the registry of

3. Tender into the registry of the court was made on January 11, 1963, as noted above.

the court; and further, that attorneys' fees for services rendered on appeal are not authorized.

[1] Olmos and National Surety are directly opposed in their contentions as to the proper interpretation of Article 2226, Vernon's Ann.Civ.Stats.,[4] the former claiming that the statute authorizes attorneys' fees and the latter claiming that it does not. Both parties cite numerous Texas decisions, each contending that the decisions are favorable to their diametrically opposed contentions. There seems to be little dispute as to the rule that the principal contractor, in this case Madden, is liable for attorneys' fees under the above mentioned statute. The dispute arises as to whether such fees are recoverable against the surety of the principal contractor.

No useful purpose would be served in undertaking to analyze every Texas case cited; or in drawing the fine distinctions which seem to be necessary in order to reconcile all of the opinions involved in the varied fact situations presented by the cases. It is sufficient to say that none of the cases cited is directly and exactly in point, and the fact situations presented by the Texas cases are not sufficiently similar in the essential and controlling factual details here under consideration to be conclusive.

In addition to numerous other cases, National Surety relies heavily on Mundy v. Knutson Construction Co., 156

4. "Art. 2226, 2178-9 Attorney's fees
"Any person having a valid claim against a person or corporation for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, may present the same to such person or corporation or to any duly authorized agent thereof; and if, at the expiration of thirty (30) days thereafter, the claim has not been paid or satisfied, and he should finally obtain judgment for any amount thereof as presented for payment to such person or corporation, he may also recover, in addition to his claim and costs, a reasonable amount as attorney's fees, if represented by an attorney."

Tex. 211, 294 S.W.2d 371; and F & C Engineering Co. v. Moore, 300 S.W.2d 323, (Tex.Civ.App. 1957) err. ref'd, n. r. e. The Mundy case asserts the general principle that a surety is not liable for attorneys' fees unless provided for by statute or by contract between the parties. It should be observed however that there was no express provision to pay attorneys' fees in the contract under consideration in the Mundy case, but the performance bond contained an agreement to "* * * repay all costs and expenses * * *" incurred in the prosecution of any suit maintained against the principal for breach of contract or for breach of the surety bond. The court interpreted the language to include attorneys' fees and concluded:

> "Since the wording of our bond expressly provides for payment of 'all costs and expenses' incurred in the prosecution of a suit or suits on a breach of the construction contract, or on that very bond, we feel attorneys' fees so incurred was a proper measure of recovery by Knutson. An attorneys' fee for the prosecution of a suit is an 'expense' incurred."

In Mundy the court further reviewed other cases which allowed attorneys' fees in suits against sureties where there was no direct, express agreement to pay attorneys' fees, but where there were provisions to pay all damages, costs, charges or expenses. In the F & C Engineering case, the court held the general contractor liable for attorneys' fees because the general contractor made a direct, special promise to the materialman that it would be responsible for and guarantee "* * * payments for all material delivered to the subcontractor." The court concluded that the promise was made to induce the delivery of the material, and that such delivery would not have been made without the promise. Article 2226, Vernon's Ann.Civ.Stats. was held applicable and attorneys' fees were awarded

against the general contractor. The court held the surety not to be liable and used only the following language with respect to the subject.

> "These attorney's fees are not recoverable as against the surety. Its obligation to pay arose from the bond sued upon and is controlled by its provisions to pay for labor and materials."

Unfortunately, the opinion does not quote the terms of the surety bond; nor is it entirely clear whether the guarantee made by the general contractor was taken into consideration at the time the surety bond therein mentioned was executed. It may well be said that F & C Engineering stands for the proposition that where a general contractor makes a special contract agreeing that it would be responsible for and guarantee payment "* * * for all material delivered to the subcontractor," the general contractor, as guarantor or surety, is liable for attorneys' fees. There was no provision in the guaranty contract relating to the payment of attorneys' fees.

The latest Texas case which has come to our attention and the one nearest in points, is Ferrier Bros., et al. v. Brown, et al., 362 S.W.2d 181, (1962 Eastland Ct.Civ.App.) err. ref'd, n. r. e. In Ferrier, reliance was placed upon our case of United States for Use and Benefit of Caldwell Foundry & Machinery Co. v. Texas Construction Co., 5 Cir. 1955, 237 F.2d 705, wherein our court held in a Miller Act case, that attorneys' fees are recoverable against the surety, and that the question is governed by state law. The opinion in Ferrier also relies upon the McGregor Act, Texas Statute, Article 5160, par. A, effective January 1, 1960, which was taken from the Miller Act.[5]

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5. The opinion in Ferrier states:
"The material portions of the Texas Statute, Article 5160, par. A, has been taken from the Miller Act."

[2] Finally, it should be noted that in Mundy the court concluded that attorneys' fees were recoverable as a part of costs and expenses incurred in the prosecution of a suit on a breach of the construction contract, "* * * or on that very bond * * *" referring to the surety bond. In the instant case, the surety undertook to assure "prompt payment" to persons supplying labor and material. When the chronology[6] of events is considered together with the other circumstances of this case, it is clear that the prime contractor defaulted in making "prompt payment", and further that the surety also defaulted and breached the condition of the bond when it failed to make "prompt payment", necessitating the employment of counsel and the institution of legal proceedings. We conclude, therefore, that the trial court was correct in its conclusion that the surety is liable, under the peculiar facts of this case.

[3, 4] We come now to a consideration of the contention of National Surety that even if attorneys' fees were allowable, the court committed error in allowing fees for services rendered subsequent to the date when liability was admitted and funds were "* * * unconditionally tendered * * *" into the registry of the court; and for concluding that Olmos is entitled to such fees for services rendered on the appeal of this case. As a matter of fact, at the late date when the tender was made, it was agreed by the parties and ordered by the court that such tender was made with preju-

6. The following is a recapitulation of the chronology involved:
**May 14, 1962:** Date of last delivery of building materials by Olmos to Madden.
**Sep. 13, 1962:** Proof of claim, notice of default, and demand for payment.
**Oct. 25, 1962:** Suit filed.
**Nov. 15, 1962:** Answer by National Surety.
**Jan. 11, 1963:** Tender of funds into the registry of the court.
**Jan. 29, 1963:** Pre-trial order and order to pay over funds to Olmos without prejudice as to attorneys' fees.
**Feb. 19, 1963:** Judgment.

dice to either party to contest the matter of attorneys' fees; and as heretofore stated, the record shows that the reasonableness of the fee awarded by the trial court is not questioned. The evidence is without dispute that the attorneys spent approximately 40 hours and that the rate of $25.00 per hour was a reasonable charge for such services. After considering all factors involved, the court allowed a fee of $750.00. Considering all of the circumstances involved, including the time of tender, the services rendered, the fee allowed, and the period over which the services were rendered, together with all other factors in the case, we find no merit in the contentions of National Surety. Only 18 days elapsed from the time the tender was made until the date of the pre-trial order, and the order directing the payment of funds to Olmos without prejudice. Final judgment was entered approximately 3 weeks later. We find the order of the court fixing the fee reasonable, proper and without error. In view of the reservation of the question as to attorneys' fees when the tender was made, and the fact that most of the services were rendered prior to the date of tender, we further conclude that it was entirely proper for the court to make the provision as to attorneys' fees for services on this appeal.

What constitutes a reasonable attorneys' fee for services rendered upon appeal in this court should be determined by the District Court. The judgment is affirmed and the cause remanded for the purpose of allowing the District Court to fix such attorneys' fees for services on appeal.

TUTTLE, Chief Judge (dissenting).

With deference to the views of my colleagues, I dissent. The parties are in agreement that under the Texas laws attorneys' fees may not be recovered in a suit of this charac-

ter, unless provided for by statute or agreed to by the parties in their contract. The only cases in which the Texas courts have permitted a recovery of attorneys' fees are cases in which the court has construed that the surety contract itself embodied such an agreement, e. g. Mundy v. Knutson Construction Company, 156 Tex. 211, 294 S. W.2d 371. The court in that case permitted a recovery against a surety because the bond itself provided that the surety was to "repay all costs and expenses * * * [Knutson)] may incur in the prosecution of any suit or suits, which they [it] may maintain against said principal on account of any breaches of said contract, or of this bond * *." It is difficult for me to see how a suit on a bond having such language as that would be authority for a decision of the court in the case before us. The language in the bond we are to construe was identical with that in F & C Engineering Co. v. Moore, Tex.Civ.App., 300 S.W.2d 323, in which the Court of Civil Appeals (San Antonio Division) found that attorneys' fees could be recovered against the principal but held that no recovery could be had against the surety since there was no provision in the bond to do more than pay promptly for materials furnished.

It is difficult for me to see what reliance can be placed on the case of Ferrier Bros. v. Brown, Tex.Civ.App., 362 S.W.2d 181, to support the majority opinion. Having held in the Ferrier Bros. case that there was no doubt but that a recovery could be had against the principal, the court then said "Any doubt as to appellees' right to also recover attorneys' fees from Ferrier Brothers' surety is dispelled by the decision of United States for Use and Benefit of Caldwell Foundry & Machine Company v. Texas Construction Company, 5 Cir., 237 F.2d 705 * * *." The opinion then quotes from an opinion of this court which raised the question on

its own motion, and then as stated, "knock[ed] it down with the observation that, in suits under the Miller Act, the recovery of interest, costs, and attorneys' fees is governed by the state law." Our opinion then cited an Alaska District Court case and an Arkansas District Court case for the proposition that allowance for attorneys' fees was proper. No Texas decision was cited.

I think that in light of the clear Texas jurisprudence, as disclosed by Mundy and F & C Engineering, supra, this Court is required to determine that the judgment should be reversed and the trial court directed to enter an order denying the right to recover on a bond worded like the one here in contest.

Rehearing denied; TUTTLE, Chief Judge, dissents.